No. 80-1182.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1980.

ROBERT W. MESERVE AND BENJAMIN H. LACY,
REORGANIZATION TRUSTEES OF THE BOSTON AND
MAINE CORPORATION, DEBTOR, AND
THE FIRST NATIONAL BANK OF BOSTON AND
MALCOLM W. HALL,
SUCCESSOR INDENTURE TRUSTEES,
PETITIONERS,

v.

CHESAPEAKE AND OHIO RAILWAY COMPANY,
MAINE CENTRAL RAILROAD COMPANY, PENN
CENTRAL CORPORATION, CANADIAN PACIFIC, AND
EASTERN ASSOCIATED COAL CORPORATION, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief in Opposition for Respondents Chesapeake and Ohio Railway Company, Baltimore and Ohio Railroad Company, and Western Maryland Railway.

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Questions Presented.

1. Did the Court of Appeals err in deciding that in the reorganization of the Boston & Maine, under Section 77(b) of the Bankruptcy Act a "current debt fund" is not required for a priority to be accorded to claims for goods or services necessary for current operations which were furnished during the six months pre-petition period by creditors who expected to be paid from the railroad's current operating revenue?
2. When a current expense fund is required to be equitably reconstructed in the application of the "Six Months" rule, should revenues included in the fund be reduced by an amount representing depreciation?

Parties.

Petitioners are identified in the Petition. Respondents are the Chesapeake and Ohio Railway Company, Baltimore and Ohio Railroad Company, Western Maryland Railway, Maine Central Railroad Company, Portland Terminal Company, Penn Central Corporation, Canadian Pacific, and Eastern Associated Coal Corporation.

This Brief is submitted on behalf of Respondents Chesapeake and Ohio Railway Company, Baltimore and Ohio Railroad Company, and Western Maryland Railway. They are wholly owned subsidiaries of CSX Corporation, a Virginia corporation. CSX also owns Seaboard Coastline Railroad Company and Louisville and Nashville Railroad Company.

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PETITIONERS,

v.

CHESAPEAKE AND OHIO RAILWAY COMPANY, MAINE CENTRAL RAILROAD COMPANY, PENN CENTRAL CORPORATION, CANADIAN PACIFIC, AND EASTERN ASSOCIATED COAL CORPORATION, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief in Opposition for Respondents Chesapeake and Ohio Railway Company, Baltimore and Ohio Railroad Company, and Western Maryland Railway.

Opinion Below.

The opinion below is set forth in the Petition Appendix A-1 to A-47 and will be cited here as Petn. App. A-1 to A-47. It is now reported at 634 F. 2d 1359 (1st Cir. 1980).

Jurisdiction.

Petitioners have sought to invoke this Court's discretionary jurisdiction pursuant to 28 U.S.C. § 1254(1).

Statutes Involved.

This case involves Section 77(b) of the Bankruptcy Act, 11 U.S.C. § 205(b) (1976) which provides in pertinent part:

> For all purposes of this section unsecured claims, which would have been entitled to priority if a receiver in equity of the property of the debtor had been appointed by a Federal court on the day of the approval of the petition, shall be entitled to such priority and the holders of such claims shall be treated as a separate class or classes of creditors.

One portion of Respondents' argument involves portions of the ESCH car service act which constitute part of Section 1 in the former codification of the Interstate Commerce Act, 49 U.S.C. § 1. The relevant paragraphs within that section are (4), (5), (10), (11), (14)(a), and (17) as they stood prior to the October 17, 1978 enactment of Pub. L. 95-473, 92 Stat. 1337, revising and recodifying the Interstate Commerce Act. They are set forth in the Appendix to this brief.

Statement of the Case.

On March 12, 1970, an involuntary petition for reorganization under Section 77 of the Bankruptcy Act, 11 U.S.C. § 205, was filed against the Boston and Maine Corporation in the United States District Court for the District of Massachusetts. The Petition was thereafter approved and Trustees appointed.

Prior to Boston and Maine's bankruptcy, Petitioners, Chesapeake and Ohio Railway Company (the C&O), Balti-

more and Ohio Railroad Company (the B&O), and Western Maryland Railway (the Western Maryland), and other railroad claimants had furnished several millions of dollars worth of car rentals (per diem), car repairs, and other services to the Boston and Maine Corporation. Car rentals, which formed the largest portion of these services, were furnished pursuant to the requirements of the Interstate Commerce Act, 49 U.S.C. § 1, and Interstate Commerce Commission rulings which also mandated prompt payment therefor. *Rules For Car-Hire Settlement,* 160 I.C.C. 369, 165 I.C.C. 494 (1930). Under railroad accounting practice and rules, periodic settlement of other interline accounts is required. *See In re Penn Central Transportation Co.,* 486 F. 2d 519, 521 (3d Cir. 1973), *cert. denied sub nom. Baker* v. *Indiana Harbor Belt Railroad Co.,* 415 U.S. 990 (1974). Respondents the C&O, the B&O and the Western Maryland furnished several hundred thousand dollars of these car loans and also rendered other interline services during the six months just prior to bankruptcy.

On November 4, 1977, the Trustees filed with the District Court a Petition To Classify Creditors and Stockholders, suggesting to the Court that creditors and stockholders be classified without any priority being accorded to creditors who had claimed to be entitled to priority based upon the "six months rule" or "the necessity of payment rule," or any related equitable theory under Section 77(b) of the Bankruptcy Act.[1] This rule or rules have been generally thought to

[1] The "six months rule" and the "necessity of payment rule" have sometimes been considered to be two aspects of one rule, *Southern Railway Co.* v. *Flournoy,* 301 F. 2d 847 (4th Cir. 1962), and sometimes considered to be separate and distinct concepts. *In re New York, New Haven and Hartford Railroad Co.,* 405 F. 2d 50 (2d Cir. 1968), *cert. denied,* 394 U.S. 999 (1969). It is generally accepted that services or goods must have been necessary in order to qualify claims for the payment under six months rule, but *Gregg* v.

provide a priority similar to that for administration expenses for pre-petition unsecured claims which represent current, necessary operating expenses of the railroad for goods or services furnished within the six months prior to the filing of the bankruptcy petition but which were not furnished in reliance on the railroad's general credit. What, if any, other essential elements are necessary to entitle such claims to priority is the issue presented by this case.

The C&O, the B&O, the Western Maryland and others filed objections to the Trustees' proposed classification, claiming equitable priorities under the "six months rule" and "the necessity of payment rule." The District Court, however, followed the Trustees' suggestion, and classified creditors and stockholders without establishing a separate class of creditors to be accorded priority as "six months" or "necessity of payment" creditors. An appeal was taken from the District Court's ruling by several railroads which had claims

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Metropolitan Trust Co., 197 U.S. 183 (1905), in explaining the *Miltenberger* case, seemed to introduce a requirement in the six months rule that *payment* be necessary to the business of the road. Respondents maintain that if payment must be shown to be necessary, that necessity can be in the form of an "imperative," *Southern Ry. Co.* v. *Flournoy*, 301 F. 2d at 854 (1962), so that it need not result from a threat to discontinue supplying the goods or services. Such an imperative can be found in the mandate under ICC rules relating to furnishing the services and to paying for them. To reward only those creditors who exploited the circumstance of dependence by threatening to cut off supplies is not in accord with traditional exercise of equitable powers.

If the "necessity of payment rule" is considered a concept completely separate and distinct from the "six months rule"—as it is in the holding of the Court below indicating that it only can be available to authorize the Trustees to make a payment they want to make to avoid a threatened cut-off—it could be of no avail to Respondents under the facts stipulated because they did not (nor could they lawfully) make such a threat nor do the Trustees seek authority to make payment.

for per diem car hire, car repair, loss and damage and freight overcharges during the six months prior to the filing of the Petition and also by a supplier of fuel.

The Court of Appeals for the First Circuit reversed the order of the District Court insofar as it failed to provide for a separate class of creditors having priority pursuant to Section 77(b) of the Bankruptcy Act.[2]

The Court of Appeals summarized the long line of cases concerning the six months rule (Part IIA of its opinion) and in its analysis of the rationale for the rule (Part IIB of its opinion), noted the persistence of two general attitudes toward the rule: "one receptive and expansive, the other insistent upon its limitations and narrow sphere of operation." Petn. App. A-34 to A-35. The Court concluded that these divergent attitudes "suggest the co-existence of two essentially different principles, neither of which limits the operation of the other, and both of which may operate in the same reorganization to embrace many of the same claims." Petn. App. A-35. The Court saw the first of these principles as one of equitable restitution, exemplified by the principles of mortgage law applied to railroad reorganizations in *Fosdick* v. *Schall*, 99 U.S. 235 (1878). The second principle "is peculiarly a principle of railroad receivership law," based upon the public interest in the continuation of railroad operations, and is

[2] Another aspect of the District Court order from which certain railroads had appealed denied the railroads a priority sufficient to assure full payment of their claims for per diem charges for cars furnished for periods from August 1, 1953, to March 12, 1970. The railroads had sought such a priority apart from the six months rule or necessity of payment rule based upon the Fifth Amendment and the Interstate Commerce Act. The Circuit Court of Appeals in its decision below affirmed the District Court's opinion in this respect and that affirmance is the subject of a Petition for a Writ of Certiorari filed by Chesapeake and Ohio Railway Company, Baltimore and Ohio Railroad Company and Western Maryland Railway on January 15, 1981 (No. 80-1196).

exemplified by *Miltenberger* v. *Logansport Railway Co.*, 106 U.S. 286 (1882). Petn. App. A-35. The Court found that the *Fosdick* principle called for certain essentials and that the *Miltenberger* principle called for others. The Court (in Part IID of its opinion) then summarized its holdings concerning six months and necessity of payment claims by saying:

> 1. The *Fosdick* principle, essentially one of equitable restitution on principles of mortgage law, and the special principle of receivership administration that emerged in *Miltenberger* are co-existing but distinct principles.
>
> 2. The *Fosdick* principle of equitable restitution provides for payment of claims for pre-reorganization current operating expenses from and to the extent of the existence of a current debt fund determined essentially as indicated in *New Haven* and in *In Re Penn Central Transportation Co., supra,* 458 F. Supp. at 1322-23, except that depreciation is not deductible in determining the amount of the income component of the current fund.
>
> 3. The *Miltenberger* receivership-administration principle provides for payment of claims on the same basis and from the same operating income as administration expenses for pre-reorganization current operating expenses that satisfy the strict requirements of the class, that is, that they are claims for necessary current operating expenses not furnished in reliance on the railroad's general credit.
>
> 4. The Necessity of Payment rule, as it has emerged as a distinct third principle, does not confer rights on claimants; it rather reflects the existence of a judicial power to authorize trustees in reorganization to pay claims where such payment is exacted as the price of providing goods or services indispensably necessary to continuing the rail service, and it reflects the existence of a

corollary judicial power to exculpate trustees who may have made such payments in exigent circumstances without first obtaining authorization by court order.

Petn. App. A-45 to A-46.

Reasons for Denying Certiorari.

I. DESPITE THE APPARENT CONFLICT BETWEEN DECISIONS OF COURTS OF APPEALS, IT IS NEITHER IMPORTANT NOR DESIRABLE FOR THE SUPREME COURT TO ATTEMPT TO ACHIEVE UNIFORMITY IN THE APPLICATION OF THE SIX MONTHS RULE. BECAUSE THE RULE IS ESSENTIALLY EQUITABLE, VARIATIONS BASED UPON THE FACTS OF EACH CASE ARE TO BE EXPECTED AND CONGRESS HAS INTENTIONALLY GIVEN LATITUDE TO THE COURTS TO DEFINE AND APPLY THE RULE ON A CASE BY CASE BASIS.

The six months rule has been evolving through a series of decisions which Petitioners argue are in conflict. Respondents suggest that this conflict is more apparent than real and represents the development of the law, a process well understood by Courts of Appeal. Respondents the C&O, the B&O and the Western Maryland adopt by reference the analysis of the case law set out in the opposition brief of the Maine Central Railroad and concur in the argument made therein that no firm conflict between the circuits concerning the six months rule is yet presented, and that this Court is warranted in awaiting further development at the Court of Appeals level before taking a case concerning the six months rule.

From the comprehensive and thoughtful summary of the cases made by the Court below (Part IIA of the decision, Petn. App. A-13 to A-34), it seems clear that three prerequisites are universally recognized as necessary to establish the equitable priority of a "six months" creditor:

1. That the claim originated as a "current expense" of ordinary operation of the railroad, necessarily incurred to keep it a going concern;

2. That the claim represented a debt contracted with the general expectation that it would be paid out of current receipts of the railroad as distinguished from a reliance on the general credit of the railroad;

3. That the claim occurred within a reasonably brief time (generally construed to be six months) prior to the appointment of the railroad receiver or trustees in reorganization.

See, e.g., Petn. App. A-38.

It is equally clear that there is a great deal of flexibility shown by the decisions of the various Circuit Courts of Appeal and in the decisions of this Court itself as to what other elements will be considered part of the rule and under what circumstances. Very early, this Court in *Fosdick* noted that "No fixed and inflexible rule can be laid down for the government of the courts in all cases. Each case will necessarily have its own peculiarities, which must to a greater or less extent, influence the Chancellor when he comes to act." *Fosdick* v. *Schall,* 99 U.S. 235, 254 (1878). In *Southern Railway Co.* v. *Carnegie Steel Co.,* 176 U.S. 257 (1900), this Court recognized that it had consciously refrained from laying down any clearly definable or uniformly applied rule. *Id.* at 285. Thus, historically, there has been wide discrepancy as to the precise contours of the rule. As the Court below indicated, some cases indicate a tendency to be expansive and others to limit and constrict the rule.

The history of flexibility in definition and application of the rule was well established by 1933 when the predecessor of Section 77(b) of the Bankruptcy Act was first enacted. Congress then had an opportunity to define the rule in precise terms. However, with obvious respect for this Court's ob-

servations that a fixed and inflexible rule would not serve the purposes of equity, Congress used language that appears intentionally designed to preserve the traditional elasticity of equity. What was then § 77(c) of the Bankruptcy Act (47 Stat. 1474) read:

> For all purposes of this Section claims against a railroad corporation which would have been entitled to priority over existing mortgages if a receiver in equity of the property of the debtor had been appointed by a Federal court on the day of the approval of the petition, shall be entitled to such priority and the holders of such claims shall be treated as a separate class or classes of creditors.

Section 77(b) of the Act set forth hereinabove is basically the same.

When the Bankruptcy Code was enacted in 1978, Congress again rejected the opportunity to make a rigid rule by providing in Section 1171(b) as amended:

> Any unsecured claim against the debtor that would have been entitled to priority if a receiver in equity of the property of the debtor had been appointed by a Federal court on the date of the order for relief under this title shall be entitled to such priority in the case under this chapter.

If Congress wanted a uniform rule, it would have devised one.

The legislative history of § 1171(b) confirms that congressional intent was that the rule remain flexible and that it be defined and applied on a case by case basis. H.R. Rep. No. 95-595, 95th Cong., 2d Sess. 424, *reprinted in* [1978] U.S. Code Cong. & Ad. News 6380, says of § 1171:

> Subsection (b) follows present section 77(b) of the Bankruptcy Act by giving priority to any unsecured claims that would be entitled to priority if a receiver in

> equity of the property of the debtor had been appointed by a Federal court on the date of the order for relief under the bankruptcy laws. *As under current law, the courts will determine the precise contours of the priority recognized by this subsection in each case.* [Emphasis added.]

The Court below has, in a reasonable manner, done what Congress wanted it to do. It determined the precise contours of the priority for the purposes of the instant case. It did so based upon facts stipulated in this case, having in mind the peculiarities of this case and carefully seeking to remain consistent with what it saw as the fundamental and distinct principles underlying the rule and the two divergent trends developed in connection with it: the principle unique to railroad reorganizations which reflects the public interest in continuance of rail transportation and the general restitution principle of mortgage law.

It is, therefore, unnecessary for this Court to grant certiorari in this case in order to attempt to make a precise and uniform rule.

With particular reference to the questions raised by the Petition whether the actual existence of a current expense fund is a necessary element of the rule and if so, whether depreciation should be deducted in computing it, one of the commentators cited by the Petitioners in their Petition, Petn. 25, concluded his note by saying:

> The value of the "net income" theory is open to doubt. It will remain so until a competent authority, with access to the books of all carriers which have passed through receivership within the last twenty or thirty years, balances the possible advantage of a direct priority as to corpus with payments as permitted by the receiver's cash position, against the expense entailed in the accounting proceedings.

Note, *The Present Status of the Six Months Rule,* 34 Colum. L. Rev. 230, 254 (1934).

It is respectfully submitted that the Supreme Court is not the appropriate body to conduct the suggested inquiry.

II. The Court below Correctly Decided Accounting Issues Related to the Six Months Rule and Therefore Further Review by This Court Is Unnecessary.

A. *A Current Debt Fund Is Not Always Necessary to the Recognition of an Equitable Priority under Section 77(b).*

In the course of its review and analysis of the many and various statements of the six months rule, the Court below discussed a line of cases following *Fosdick* v. *Schall,* 99 U.S. 235 (1879), which indicates that the equitable reconstruction of a fund consisting of income (or income minus certain expenses), the "current debt fund,"[3] was necessary to the application of the rule. There is no doubt that there is such a line of cases, *e.g., Gregg* v. *Metropolitan Trust Co.,* 197 U.S. 183 (1905); *Burnham* v. *Bowen,* 111 U.S. 776 (1884); *Southern Railway Co.* v. *Carnegie Steel Co.,* 176 U.S. 257 (1900).

It is equally clear that a "current debt fund" had not invariably been found to be necessary in order to accord a priority to six months claims. *Miltenberger* v. *Logansport*

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[3] The cases use a variety of terms to refer to sources of the current expense fund, including "current receipts," *Southern Railway Co.* v. *Carnegie Steel Co.,* 176 U.S. 257, 285 (1900); *Fosdick* v. *Schall,* 99 U.S. 235, 252 (1878); "income," *Virginia & Alabama Coal Co.* v. *Central Railroad and Banking Co.,* 170 U.S. 355, 368 (1898); "surplus earnings," *Kneeland* v. *American Loan & Trust Co.,* 136 U.S. 89, 96 (1890); "gross income," *St. Louis, Alton and Terre Haute Railroad Co. v. Cleveland, Columbus, C. & I. Railway Co.,* 125 U.S. 658, 673 (1888); and "current earnings," *Burnham* v. *Bowen,* 111 U.S. 776, 778 (1884).

Railway Co., 106 U.S. 286 (1882); *Southern Railway Co.* v. *Flournoy*, 301 F. 2d 847 (4th Cir. 1962); *In re Tennessee Central Railway Co.*, 316 F. Supp. 1103 (M.D. Tenn. 1970), *vacated on other grounds*, 463 F. 2d 73 (6th Cir. 1972), *cert. denied*, 409 U.S. 893 (1972).

The Court then proceeded to seek and find a rationale for the apparent inconsistency. It found one principle running through the one line of cases and another running through the second. It reconciled any apparent inconsistency by finding one principle to be based on restitution concepts of mortgage law, according to which such a fund is necessary before current expense creditors have a claim in equity to a priority, and another based on the law of railroad receiverships, reflecting the public's particular interest in the continued operation of the railroads as giving rise to an equitable claim to priority by those who furnish current necessities of railroad operation. The conclusion of the First Circuit Court of Appeals—that a current debt fund need not be shown by six months creditors whose claims represent indebtedness for ordinary and necessary current operating expenses indispensable to continued rail service and who did not rely on the debtor's general credit—is consistent with the more expansive line of cases. It is also in keeping with the principle of railroad receivership law underlying those cases which reflects the important public interest in the continued operation of railroads. Furthermore, the Court found that not requiring the existence of such a fund for pre-petition necessities serves to eliminate "the inequity arising out of the accidental circumstance of non-payment before the filing of the petition." Petn. App. A-39.

For the Court to have considered the public interest in the continuation of the railroad sufficiently important to support a priority for claims for necessary current operating expenses without reference to the existence of a "current debt

fund" and for it to have used this concept to eliminate inequities is surely within the latitude Congress intended courts to have when it incorporated in a broad and unrestricted manner the concept of equitable priorities into Section 77(b) of the Bankruptcy Act (see Section I of this brief, 7 to 11, *supra*). Such a priority is consistent with the nature and purpose of Section 77 which recognizes throughout the dual objectives "of conserving the debtor's estate for the benefit of creditors and preserving an ongoing railroad in the public interest," and by doing so, confers upon courts deciding railroad reorganization priority questions " 'power . . . beyond that in ordinary bankruptcy proceedings.' " *New Haven Inclusion Cases*, 399 U.S. 392, 420-421 (1970).

B. *Depreciation Should Not Be Deducted in Determining Existence of a Current Debt Fund.*

The Court below correctly determined that where a current debt fund is necessary, that is, where the claim is based on the *Fosdick* theory and cannot be supported by the *Miltenberger* principles, depreciation is not to be deducted from revenue to determine the existence or extent of the fund. The *Fosdick* principle of equitable restitution entitles claims for current operating expenses to be paid from and to the extent of current operating revenues. It is a concept relating to the existence of sufficient cash flow. Depreciation is not relevant to the concept. As the Court below said: "[F]irst to last depreciation is related to capital, its exhaustion and its replacement, not to its maintenance, and is not an expenditure that affects cash flow of the accounting period." Petn. App. A-44. There is no unfairness in denying the benefits of depreciation to the mortgagee as the mortgagee is not entitled to a security greater than that provided for by his lien. His lien attaches only to the property covered by the mortgage, including replacements, additions, and betterments, but *not* to any fund

(real or paper) representing depreciation. The inclusion of depreciation in the calculation of expenses "exacerbates the failure to reflect properly the nature of the six months rule. Since the six months creditors must rely upon the railroad's short-term ability to pay its current debts, the reduction of the current expense fund by a non-cash item such as depreciation, which does not directly impair the railroad's short-term cash or current receipts position, is improper." Note, *Bankruptcy Law—The Continued Validity of the Six Months Rule in Railroad Receiverships*, 57 N.C. L. Rev. 137, 146 (1978).

Conclusion.

For all of the foregoing reasons, the Petition for a writ of certiorari on questions concerning the six months rule should be denied.

DATED: February 13, 1981.

Respectfully submitted,

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Appendix.

49 U.S.C. § 1

The Interstate Commerce Act

§ 1, par. (4). [DUTY TO FURNISH TRANSPORTATION AND ESTABLISH THROUGH ROUTES; DIVISIONS OF JOINT RATES.] It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer to prejudice any of such participating carriers.

. . .

§ 1, par. (5). [JUST AND REASONABLE CHARGES.] All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

. . .

§ 1, par. (10). ["CAR SERVICE" DEFINED.] The term "car service" in this chapter shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this chapter.

. . .

§ 1, par. (11). [DUTY TO FURNISH CAR SERVICE; RULES AND REGULATIONS.] It shall be the duty of every carrier by railroad subject to this chapter to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

. . .

§ 1, par. (14). [PRIOR TO 1966 AMENDMENT.] [ESTABLISHMENT BY COMMISSION OF RULES, ETC., AS TO CAR SERVICE.]

(a) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices.

§ 1, par. (14). [INCLUDING 1966 AMENDMENT AND 1976 AMENDMENT.] [ESTABLISHMENT BY COMMISSION OF RULES, ETC., AS TO CAR SERVICE; PROCEDURES APPLICABLE.]

(a) It is the intent of the Congress to encourage the purchase, acquisition, and efficient utilization of freight cars. In order to carry out such intent, the Commission may, upon complaint of an interested party or upon its own initiative without complaint, and after notice and an opportunity for a hearing, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter, including (i) the compensation to be paid for the use of any locomotive, freight car, or other vehicle, (ii) the other terms of any contract, agreement, or arrangement for the use of any locomotive or other vehicle not owned by

the carrier by which it is used (and whether or not owned by another carrier, shipper, or third party), and (iii) the penalties or other sanctions for nonobservance of such rules, regulations, or practices. In determining the rates of compensation to be paid for each type of freight car, the Commission shall give consideration to the transportation use of each type of freight car, to the national level of ownership of each such type of freight car, and to other factors affecting the adequacy of the national freight car supply. Such compensation shall be fixed on the basis of the elements of ownership expense involved in owning and maintaining each such type of freight car, including a fair return on the cost of such type of freight car (giving due consideration to current costs of capital, repairs, materials, parts and labor). Such compensation may be increased by any incentive element which will, in the judgment of the Commission, provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car if the Commission finds that the supply of such type of freight car is adequate. The Commission may exempt such incentive element from the compensation to be paid by any carrier or group of carriers if the Commission finds that such an exemption is in the national interest.

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§ 1, par. (17). [DIRECTIONS OF COMMISSION AS TO CAR SERVICE; DISOBEDIENCE; RIGHTS OF STATES; BRIBERY.] . . . It shall be the duty of all carriers by railroad subject to this chapter, and of their officers, agents, and employees, to obey strictly and conform promptly to such orders or directions of the Commission, and in case of failure or refusal on the part of any carrier, receiver, or operating trustee to comply with any such order or direction such carrier, receiver, or trustee shall be liable to a penalty of not less

than $100 nor more than $500 for each such offense and $50 for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States . . . .